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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statute Involved | 3 |
| Statement | 3 |
| Reasons for Granting the Writ | 7 |
| Conclusion | 18 |
| Appendix | 1a |


## AUTHORITIES CITED

Cases:


City of Pittsburgh v. F. P. C., 237 F. 2d 741 ..... 13
Curtis Brothers, Inc., 119 NLRB 232 ..... 7, 8, 9, 10, 11, 15
Drivers Local Union No. 639 v. National Labor Relations Board 43 LRRM 2156 ..... 7, 15
General Shoe Corp., 90 NLRB 1330 ..... 11
Hormel v. Helvering, 312 U. S. 552 ..... 16
International Brotherhood of Teamsters, Local 179, 110 NLRB 287 ..... 11
International Rice Milling Co., Inc., 84 NLRB 360 ..... 11
Ladner v. United States, 3 L. ed. 2d 199 ..... 16
Leedom v. Kyne, 358 U. S. 184 ..... 17
Marshall Field and Co. v. N. L. R. B., 318 U. S. 253 ..... 12
N. L. R. B. v. Cheney California Lumber Co., 327 U. S. 385 ..... 12, 14
N. L. R. B. v. Drivers Local Union No. 639, No. 717, October Term 1958 ..... 7
Phillips v. S. E. C., 156 F. 2d 606 ..... 13, 16
Shepherd Machinery Co., 119 NLRB 320 ..... 8, 10
Smith v. Apple, 264 U. S. 274 ..... 16
United States v. L. A. Tucker Truck Lines, 344 U. S. 33 ..... 12
United States v. Spector, 343 U. S. 169 ..... 16
Utah Construction Co., 95 NLRB 196 ..... 11

STATUTES: Page

National Labor Relations Act (61 Stat. 136, 29 U.S.C. Secs. 151) ..... 3
Section 7 ..... 4
Section 8(a)(3) ..... 4
Section 8(b)(1)(A) ..... 2, 4, 5, 6, 7, 8, 9, 10, 11, 14
Section 8(b)(2) ..... 4, 5
Section 10(e) ..... 6, 8, 12, 13, 14, 15, 16, 17

Public Utility Holding Company Act, Section 24(a) . 13
29 U.S.C. 1254 (1) ..... 2

MISCELLANEOUS:

Davis, Admin. Law, § 20.06, p. 92 (1958) ..... 17

National Labor Relations Board Rules

Section 102.48(a) ..... 11
Section 102.48(b) ..... 11

National Labor Relations Board Statements of Procedure

Section 101.12(a) ..... 12
Section 101.12(b) ..... 12

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International Association of Machinists, Lodge 942, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 10, 1959.

### OPINIONS BELOW

The opinion of the Court of Appeals is reported at 263 F. 2d 796 (*infra*, pp. 1a-7a). Its further

opinion rendered in connection with its partial denial of petitioner's motion to stay the judgment pending application for certiorari is not yet reported (*infra*, pp. 8a-9a). The decision and order of the Board, Member Murdock dissenting, are reported at 119 NLRB 307 (R. 18-53).

## JURISDICTION

The judgment of the Court of Appeals was entered on March 10, 1959 (*infra*, pp. 10a-13a). A petition for rehearing, filed on February 20, 1959, was denied on February 26, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether Section 8(b)(1)(A) of the National Labor Relations Act prohibits peaceful picketing by a union to secure its recognition as the employees' exclusive barganing representative at a time when the union does not represent a majority of the employees within the appropriate unit.

2. Whether a Court of Appeals is required *sua sponte* to decline to review the merits of a question because of the absence of exceptions to the trial examiner's intermediate report where (1) the National Labor Relations Board disregarded the absence of exceptions and affirmatively considered and decided the question on its merits, (2) the question is one of law pertaining to whether the Board has acted in excess of its statutory authority, and (3) no party to the proceeding before the Court of Appeals interposed any objection to judicial review of the merits of the question.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are set forth in the statement.

## STATEMENT

The Board found that petitioner engaged in three forms of activity: (1) For nearly a year from August 16, 1955 to July 13, 1956, except for a four to six week interval during the winter of 1955-1956, petitioner peacefully picketed the premises of Alloy Manufacturing Company. The picketing was carried on by a single person. The picket sign originally read "This firm is Nonunion" and was later changed to read "Nonunion employees unfair." (R. 39; 70, 73-75, 106-107, 108.) (2) On June 20, 1955, petitioner wrote to the Spokane Central Labor Council requesting that Alloy be placed on the Council's "We Do Not Patronize" list. On July 27, the Council placed Alloy on the list. The list is published in the "Labor World," the official periodic publication of the Council. (R. 37, 38; 58, 71, 76, 115-116, 122-123.) (3) Petitioner asked several of Alloy's customers not to patronize Alloy (R. 21, 39-40; 79-82).

The Board found that petitioner carried on this three-faceted activity for the purpose of inducing Alloy (1) to recognize petitioner as the exclusive representative of its employees, and (2) to enter into a union shop agreement with it (R. 19, 20, 23-24, 52). The Board also found that petitioner did not represent a majority of Alloy's employees (*ibid.*). The Board concluded, based on its finding that petitioner sought exclusive recognition when it had no majority, that by each of the three separate facets of its activity—

the picketing, the "We Do Not Patronize" list, and the customer appeals — petitioner violated Section 8(b)(1)(A) of the Act (R. 19, 23-24). Section 8(b)(1)(A) provides that it shall be an unfair labor practice for a labor organization or its agents "to restrain or coerce employees (A) in the exercise of the rights guaranteed in section 7. . . ." Section 7 provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

The Board further concluded, based on its finding that petitioner sought a union shop agreement when it had no majority, that by each of the three separate facets of its activity petitioner independently violated Section 8(b)(2) and (1)(A) of the Act (R. 19-20, 52). Section 8(b)(2) provides that it shall be an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3). . . ." Section 8(a)(3) makes it an unfair labor practice for an employer to encourage or discourage membership in a labor organization by discrimination in employment, and *inter alia* excepts a union shop agreement from its scope if the "labor organization is the representative of the employees as

provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made. . . ."

Upon the Board's petition to enforce its order, the Court of Appeals disposed of the case on the following basis:

(1) In the court below petitioner agreed that a demand for a union shop agreement, backed by picketing to support it, when a union does not represent a majority, is a violation of Section 8(b)(2) of the Act. Petitioner also agreed that the Board's findings to this effect were supported by substantial evidence, and petitioner therefore acquiesced in the entry of a decree to enforce that part of the Board's order based on the finding of a violation of Section 8(b)(2) by picketing. In reliance upon this concession, the court below enforced the Board's order in this respect (*infra*, p. 3a-4a). And since the conduct was thus effectively prohibited through the medium of Section 8(b)(2), the court found it unnecessary to determine whether the conduct independently violated Section 8(b)(1)(A) (*infra*, pp. 4a, 5a).

(2) With respect to the customer appeals and the "We Do Not Patronize" list, the court below found "the conduct of Union of listing and persuasion, excepting picketing, to be within the general area of protection of the 1st amendment guarantying freedom of speech" (*infra*, p. 7a). It therefore set aside the Board's order "in so far as it prohibits listing of Alloy on the 'We Do Not Patronize' list and the importuning of customers not to patronize Alloy" (*infra*, p. 7a).

(3) As to petitioner's picketing for recognition, the court below found that the question whether "picketing for the purpose of achieving designation of it as the exclusive bargaining agent violated section 8(b)(1)(A) cannot be entertained by us because Union took no exception to that finding of the examiner—indeed it filed no objections to the report of the examiner at all" (*infra*, p. 4a). The court was of the view that it was therefore precluded by Section 10(e) from considering the merits of the question. Section 10(e) provides in pertinent part that: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The court concluded that "Union having failed to make any objection to the finding by the examiner and a recommendation that it be restrained from picketing to enforce exclusive recognition leaves us no other choice than to sustain the order of the Board as far as it respects picketing" (*infra*, p. 5a).

Petitioner filed a petition for rehearing in which it took the position that Section 10(e) had no applicability. The petition pointed out that: (1) the Board disregarded the absence of exceptions and affirmatively considered and decided the merits of the question; (2) the question is one of law and pertains to whether the Board has acted in excess of its statutory authority; and (3) the Board interposed no objection before the court to judicial review of the merits of the question, the court having raised the issue *sua sponte*. The court denied the petition for rehearing.

## REASONS FOR GRANTING THE WRIT

1. The decree of the court below requires *inter alia* that petitioner shall cease and desist from "Restraining or coercing employees of Alloy Manufacturing Company in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended, . . . by picketing for the purpose of obtaining recognition of Alloy's employees at a time when it does not represent a majority of them" (*infra*, pp. 10a-11a). This prohibition is based on the Board's conclusion that petitioner "violated Section 8(b)(1)(A) by picketing Alloy for exclusive recognition when it represented no more than a minority of employees" (R. 19). The Board supported its conclusion on the authority of its contemporaneous decision in *Curtis Brothers, Inc.*, 119 NLRB 232 (*ibid.*). The Court of Appeals for the District of Columbia Circuit set aside the Board's order in *Curtis Brothers*, *sub nom. Drivers Local Union No. 639* v. *National Labor Relations Board*, 43 LRRM 2156 (November 26, 1958), holding that "§ 8(b)(1)(A) is inapplicable to peaceful picketing, whether 'organizational' or 'recognitional' in nature . . ." (*id.* at 2157). The decree in this case thus prohibits conduct which the Court of Appeals for the District of Columbia Circuit states is outside the statutory scope of Section 8(b)(1)(A). The Board on February 20, 1959, filed a petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit. *National Labor Relations Board* v. *Drivers Local Union No. 639*, No. 717, October Term 1958. This Court granted the petition on April 20, 1959.

2. The court below declined to reach the merits of the question whether peaceful picketing to obtain the

recognition of a union as the exclusive bargaining representative at a time when it does not have a majority constitutes a violation of Section 8(b)(1)(A) of the Act. It held that, in the absence of exceptions by petitioner to the trial examiner's intermediate report, the merits of the question "cannot be entertained by us" (*infra*, p. 4a) and "leaves us no other choice than to sustain the order of the Board as far as it respects picketing" (*infra*, p. 5a). This holding presents an important question of appellate practice in the judicial review of agency determinations which the court below has decided in conflict with the principles enunciated in applicable decisions of this Court.

(a) Section 10(e) of the Act provides that: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Section 10(e) has no application in this case. For the short of the matter is that the Board did not rely upon the lack of exceptions but considered and decided the question on its merits.

The Board's current interpretation of Section 8(b)(1)(A) was enunciated in three companion cases: this case, *Curtis Brothers*, 119 NLRB 222, and *Shepherd Machinery Co.*, 119 NLRB 320. The Board issued *Curtis Brothers* on October 30, 1957, and four days later, on November 4, 1957, it issued this case and *Shepherd*.

The Board in its decision in this case stated that (R. 19):

> The Trial Examiner found that by its conduct in picketing the premises of the Alloy Manufac-

turing Company with an object of obtaining exclusive recognition at a time when it did not represent a majority of Alloy's employees, the Respondent Union violated Section 8(b)(1)(A) of the Statute. No exceptions have been filed to this conclusion. The Trial Examiner's findings of fact, preliminary to his conclusion of law, are amply supported by the record. Moreover, his conclusion comports with our decision in *Curtis Brothers,* 119 NLRB No. 33. Accordingly, we find, as did the Trial Examiner, that the Respondent violated Section 8(b)(1)(A) by picketing Alloy for exclusive recognition when it represented no more than a minority of employees.[2]

[2] Member Jenkins who concurred specially in the *Curtis* decision limited his concurrence therein to the unlawful picketing after a decertification election—which he believed to be the issue raised by the complaint in *Curtis*. As the complaint in the instant case is broader in that it covers all picketing for an illegal objective regardless of whether there has been an election, he therefore subscribes fully to the opinion herein.

Thus the Board did not state that it was adopting the examiner's conclusion in the absence of exceptions to it; rather it stated that it was independently finding as he did on the authority of its own contemporaneous decision in *Curtis.* Furthermore, the Board utilized this case to extend the theory it had adopted in *Curtis.* Based on the view that minority picketing for recognition violates Section 8(b)(1)(A), the Board in this case concluded that minority picketing for a union shop agreement also violates Section 8(b)(1)(A), for the "same underlying considerations explicated in the *Curtis Brothers* decision leading to the conclusion that picketing for exclusive recognition restrains and coerces within the meaning of Section 8(b)(1)(A), apply with equal force to picketing by a minority

union for purposes of obtaining a union shop agreement" (R. 20). The Board then took a further step. Finding that the customer appeals and the "We Do Not Patronize" list were also employed to secure recognition, the Board stated that "for the same reasons that we have found the picketing in *Curtis Brothers* and here to be in violation of Section 8(b)(1)(A), we find that the customer appeals and the publication of the 'We Do Not Patronize' list also violated that section of the Act" (R. 23-24).

Member Murdock in dissent noted that the absence of exceptions was a means of disposing of the issues without reaching the merits and remonstrated the majority for not following that course (R. 27-28):

> Inasmuch as no exceptions were filed to the Trial Examiner's findings with respect to the 8(b)(2) and 8(b)(1)(A) violation or to his failure to find an 8(b)(1)(A) violation on the basis of picketing for a union shop, I see no reason to pass upon these issues. However, as the majority's 8(b)(1)(A) findings are based upon the theory of coercion adopted in the *Curtis* case, that peaceful picketing for recognition by a union constitutes coercion under Section 8(b)(1)(A), I do not agree with the rationale of the findings.

And, while the Board denied the request for oral argument in this case (R. 18, n. 1), the Board heard oral argument in *Curtis* and in *Shepherd* simultaneously (119 NLRB 232, n. 1, 239, n. 11, 320, n. 1), and it issued its decision in *Shepherd* and in this case on the same day, giving this case the earlier number and disposing of an issue in *Shepherd* by citation of this case (119 NLRB 320, n. 2).

It is thus patent that the Board deliberately disregarded the absence of exceptions and instead chose to utilize this case and *Curtis* as its vehicles for the full expression of its pioneer interpretation of Section 8(b)(1)(A). It is not unusual for the Board to consider the merits of a matter although no exceptions are directed to it. Under its rules, although it need not, it may consider a particular issue to which no exception is taken if the case is before it on any exceptions.[1] It not infrequently does so.[2] It did so here designedly and with full foreknowledge.

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[1] Section 102.48(a) of the Board's rules provides that:

> In the event *no* statement of exceptions is filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order *shall* be adopted by the Board and become its findings, conclusions, and order, and *all* objections and exceptions thereto *shall be deemed waived* for *all* purposes [emphasis supplied].

On the other hand Section 102.48(b) provides that:

> Upon the filing of a statement of exceptions and briefs, as provided in section 102.46, the Board *may* decide the matter forthwith upon the record, or after oral argument, or *may* reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or *may* close the case upon compliance with recommendations of the inter-

(*Footnote One Continued on Page 12*)

[2] *E.g., International Brotherhood of Teamsters, Local 179*, 110 NLRB 287, 288; *Utah Construction Co.*, 95 NLRB 196, 211, n. 38; *General Shoe Corp.*, 90 NLRB 1330, 1333, n. 12; *International Rice Milling Co., Inc.*, 84 NLRB 360 (wherein the Board dismissed a complaint although no exceptions were taken to the examiner's findings of violations and the only exceptions taken were by proponents of the complaint who contended that the examiner had not gone far enough. For a further history of this case see 183 F. 2d 21 (C.A. 5), reversed in part, 341 U.S. 665).

In these circumstances there is no room for the application of Section 10(e). Section 10(e) expresses "the salutary policy . . . of affording the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field and Co. v. National Labor Relations Board*, 318 U.S. 253, 256; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 389. When the Board, despite the absence of exceptions, does consider on the merits the question thereafter urged on review, the reason for the rule disappears. The Board cannot claim either that it was deprived of an administrative "opportunity for correction" (*United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 37), or that it was

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(*Footnote One Continued From Page 11*)

> mediate report, *or may make other disposition of the case* [emphasis supplied].

Section 101.12(a) of the Board's Statements of Procedure explains in part that:

> If *any* party files exceptions to the intermediate report, the Board, with the assistance of the legal assistants to each Board member who function in much the same manner as law clerks do for judges, *reviews the entire record*, including the trial examiner's report and recommendations, the exceptions thereto, the complete transcript of evidence, and the exhibits, briefs, and arguments. * * * It then issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the trial examiner [emphasis supplied].

On the other hand Section 101.12(b) explains that:

> If *no* exceptions are filed to the intermediate report and the respondent does not comply with its recommendations, the Board adopts the report and recommendations of the trial examiner. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes [emphasis supplied].

not "put. . . . on notice of the issue now presented" (*May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 386, n. 5). The Board deliberately sought out the issue and considered its merits as fully as it would have had specific exception been taken. To apply Section 10(e) nonetheless would be an anachronistic exaltation of form.

Accordingly, as the Court of Appeals for the Second Circuit said of Section 24(a) of the Public Utility Holding Company Act,[3] a provision like Section 10(e), "It seems not inappropriate for us to consider the lack of objection here as excused because of the Commission's own actions in examining the issue involved and to decide the case upon the merits. . . ." *Phillips* v. *S. E. C.*, 156 F. 2d 606, 608. And as the Court of Appeals for the District of Columbia Circuit has similarly stated, "Section 19(b) of the Natural Gas Act limits our consideration to those points which have been urged before the Commission in an application for rehearing. The plain purpose of that provision of the statute is to give the Commission an opportunity to rule upon any matter which is to be relied upon on review. The Commission is thus placed in the position of framing the issues we shall hear. By waiving a procedural irregularity and deciding the underlying substantive issue, the Commission places that substantive issue before us for review." *City of Pittsburgh* v. *F. P. C.*, 237 F.2d 741, 749. So here, by disregarding the absence of exceptions and deciding the merits of the underlying substantive issue, the Board places that

[3] "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure to do so."

substantive issue before the court for review. The Board has not, at least so far, contended otherwise (*infra*, pp. 15-16).

(b) There is an inherent limitation upon the applicability of Section 10(e) which is pertinent here. The absence of objection does not foreclose judicial inquiry to determine whether the Board has "traveled outside the orbit of its authority. . . .". *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388 The issue in this case is squarely within this reservation. It presents the naked question of law whether the Board acts in excess of its statutory authority when it requires the cessation of picketing to secure the recognition of a union which does not have majority status. To the solution of this question agency expertness does not contribute. Even if it did, the Board has expressed its full thoughts on the subject. And this is not the distinct situation where the power of the agency to lay its hand upon the subject is admitted and the only question is whether the circumstances exist which render exertion of the power permissible. If the Court of Appeals for the District of Columbia Circuit is correct in its view of the reach of Section 8(b)(1)(A) the decree of the court below would prohibit petitioner from engaging in conduct which is allowable to all others under the law of the land.[4]

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[4] The extent of the deprivation is apparent from the opinion of the court below rendered in connection with its partial denial of a motion to stay pending application for certiorari. In the motion for the stay petitioner explained that no picketing was currently in progress at the employer's premises, and that, "Should picketing of Alloy's premises be resumed, its purpose will be confined to (1) persuading the employees of Alloy to join . . . [petitioner], and/or (2) persuading customers of Alloy not to patronize it. No picketing for the purpose of securing . . . [petitioner's] recognition as the employees' exclusive bargaining representative will take place unless and until a majority of Alloy's employees desig-

(c) Neither in its statement of points (R. 139), its brief, or on oral argument in the court below did the Board suggest that Section 10(e) applied to preclude consideration of the merits of the naked question of law presented. On the contrary, the Board in its brief below carefully differentiated between (1) the question of the substantiality of the evidence to support the findings of fact and (2) the question of law presented based upon acceptance of the findings. As to the findings of fact only did the Board urge that in the absence of exceptions these "are not subject to contest before this Court" (Bd. br. p. 13).[5] Upon the

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nate the . . . [petitioner] as their representative" (R. 160). In its opinion denying the stay, the court below quoted the first sentence, but not the second, and then stated, "The Board suggests, and we agree, that to subject Alloy and its employees to this kind of pressure to select an unwanted representative would, if the Board's view be ultimately sustained, result in a pro tanto impairment of the Act's policies" (*infra*, p. 9a). The Board made no suggestion in its opposition to the stay that picketing for the purposes described in the motion would violate the decree or the Act (R. 166-167). Such a suggestion would have been inconsistent with its express reservation of the question whether organizational picketing, as distinct from recognitional picketing, violated Section 8(b)(1)(A) of the Act (*Curtis Brothers, Inc.*, 119 NLRB 232, 239, enforcement denied, *sub nom. Drivers Local Union No. 639* v. *National Labor Relations Board*, 43 LRRM 2156 (C.A.D.C.), certiorari granted, April 20, 1959, No. 717, October Term, 1958). This reservation had been expressly noted by the Board in its opening brief in the court below (p. 28, n. 15). The picketing which the decree enjoins is recognition picketing. Petitioner's motion to stay explicitly disclaimed any intention to engage in recognition picketing and specifically stated any picketing would be confined to persuading employees to join and/or persuading customers not to patronize a non-union firm. Yet the court below slid from a decree enjoining recognition picketing to an apparent view that the decree enjoined organizational and consumer picketing.

[5] We have requested the Clerk of the Court of Appeals for the Ninth Circuit to lodge ten certified copies of the Board's brief in the court below with the Clerk of this Court.

question of law the Board in its brief addressed itself entirely to the merits and at no point intimated that the merits were not properly before the court below (Bd. br. pp. 15-41). Since petitioner did not contest the findings of fact, and since the applicability of Section 10(e) to the question of law had not been put in issue by the Board, petitioner did not treat with it in the court below until it filed its petition for rehearing *after* the court had raised the question *sua sponte*. The court thus of its own motion based decision on a point which, if available to the Board at all, had been waived by it. And since Section 10(e) is not "a limitation on jurisdiction" but rather "a mandate to be observed by the reviewing court in the exercise of its admitted jurisdiction" (*Phillips* v. *S. E. C.*, 156 F. 2d 606, 608 (C. A. 2), cf. *Smith* v. *Apple*, 264 U.S. 274, 277-280), the court below was not obliged to animate an issue which had not been tendered. As a matter of judicial administration it would seem to be at least as salutary for a court not to consider an issue not urged before it as to decline to consider the merits of a naked question of law because of the absence of exceptions before the agency.[6]

(d) Section 10(e) is not so exigent as to require or permit the court below *sua sponte* to decline to reach the merits of a naked question of law which the Board did affirmatively consider and decide and which goes to the Board's statutory authority. As this Court stated in *Hormel* v. *Helvering*, 312 U.S. 552, in holding that a Court of Appeals "should have given and properly did give consideration" to a point not presented to or considered by the Board of Tax Appeals (*id.* at

[6] See *Ladner* v. *United States*, 358 U.S. 169, 172-173; *United States* v. *Spector*, 343 U.S. 169, 172.

559), as ingrained a part of the rule that "Ordinarily an appellate court does not give consideration to issues not raised below" (*id.* at 556) is the qualification "that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice" (*id.* at 558). To heed the qualification is not to disrespect the rule (*id.* at 557):

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

The *Hormel* teaching is particularly pertinent here. For here the Board *did* consider and decide the merits of the issue which the court below was asked to review, here the issue pertains to "agency action taken in excess of delegated powers" (*Leedom* v. *Kyne,* 358 U.S. 184, 190), and here no objection had been interposed to judicial review of the merits of the issue. To read Section 10(e) as nevertheless precluding judicial review is to disregard its purpose and the tradition of appellate practice of which it is a part. "The rule is not rigid but flexible; it is clearly susceptible of judicial manipulation to take account of needs of justice in special circumstances." 3 Davis, Admin. Law, § 20.06, p. 92 (1958). And the words of Section 10(e), stating that the lack of objection before the Board "shall be excused because of extraordinary circumstances," are certainly supple enough to embrace this situation.

question of law the Board in its brief addressed itself entirely to the merits and at no point intimated that the merits were not properly before the court below (Bd. br. pp. 15-41). Since petitioner did not contest the findings of fact, and since the applicability of Section 10(e) to the question of law had not been put in issue by the Board, petitioner did not treat with it in the court below until it filed its petition for rehearing *after* the court had raised the question *sua sponte*. The court thus of its own motion based decision on a point which, if available to the Board at all, had been waived by it. And since Section 10(e) is not "a limitation on jurisdiction" but rather "a mandate to be observed by the reviewing court in the exercise of its admitted jurisdiction" (*Phillips* v. *S. E. C.*, 156 F. 2d 606, 608 (C. A. 2), cf. *Smith* v. *Apple*, 264 U.S. 274, 277-280), the court below was not obliged to animate an issue which had not been tendered. As a matter of judicial administration it would seem to be at least as salutary for a court not to consider an issue not urged before it as to decline to consider the merits of a naked question of law because of the absence of exceptions before the agency.[6]

(d) Section 10(e) is not so exigent as to require or permit the court below *sua sponte* to decline to reach the merits of a naked question of law which the Board did affirmatively consider and decide and which goes to the Board's statutory authority. As this Court stated in *Hormel* v. *Helvering*, 312 U.S. 552, in holding that a Court of Appeals "should have given and properly did give consideration" to a point not presented to or considered by the Board of Tax Appeals (*id.* at

[6] See *Ladner* v. *United States*, 358 U.S. 169, 172-173; *United States* v. *Spector*, 343 U.S. 169, 172.

559), as ingrained a part of the rule that "Ordinarily an appellate court does not give consideration to issues not raised below" (*id.* at 556) is the qualification "that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice" (*id.* at 558). To heed the qualification is not to disrespect the rule (*id.* at 557):

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

The *Hormel* teaching is particularly pertinent here. For here the Board *did* consider and decide the merits of the issue which the court below was asked to review, here the issue pertains to "agency action taken in excess of delegated powers" (*Leedom* v. *Kyne*, 358 U.S. 184, 190), and here no objection had been interposed to judicial review of the merits of the issue. To read Section 10(e) as nevertheless precluding judicial review is to disregard its purpose and the tradition of appellate practice of which it is a part. "The rule is not rigid but flexible: it is clearly susceptible of judicial manipulation to take account of needs of justice in special circumstances." 3 Davis, Admin. Law, § 20.06, p. 92 (1958). And the words of Section 10(e), stating that the lack of objection before the Board "shall be excused because of extraordinary circumstances," are certainly supple enough to embrace this situation.

## CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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